83-268

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MICHELIN TIRE CORPORATION,
COMMERCIAL DIVISION,

Petitioner

v.

BOSTICK OIL COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Do complaints by some dealers to a manufacturer about a competing dealer's pricing policies, coupled with later termination of the dealer relationship between the manufacturer and the subject dealer, permit an inference of conspiracy between the complaining dealers and the manufacturer, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1?

2. Is a manufacturer's marketing program subject to antitrust scrutiny under the standard of *per se* illegality, rather than the rule of reason, based upon the program's possible use as a means of monitoring dealer pricing and its possible use as a barrier between dealers and customers in pricing matters?

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AUTHORITIES

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The Petitioner, Michelin Tire Corporation, Commercial Division, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in the proceedings on March 14, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 702 F.2d 1207 and is reproduced as Appendix A to this Petition.

The opinion of the District Court for the District of South Carolina, entered September 17, 1981, is unpublished. It is reproduced as Appendix C to this Petition.

JURISDICTION

The judgment of the Court of Appeals (Appendix A *infra*) was entered on March 14, 1983. A timely petition for rehearing was denied on May 23, 1983, with Judges Russell, Widener, Hall and Chapman voting in favor of rehearing (Appendix B *infra*). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This action involves Section 1 of the Sherman Act, 15 U.S.C. § 1, which provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . . .

STATEMENT OF THE CASE

Michelin Tire Corporation, Commercial Division (Michelin), markets its tires and tubes in the United States through independent dealers who contract with Michelin to provide retail sales and service. Michelin and Bostick Oil Company, Inc. (Bostick) entered into the first of four, one-year sales agreements, by which Bostick became a dealer in passenger and truck tires, in May of 1974. In April 1978, Michelin informed Bostick that it had elected not to renew the truck tire portion of the existing agreement when it expired in May of 1978. Bostick thereafter filed this action, stating five causes of action, two of which alleged violations of Section 1 of the Sherman Act, 15 U.S.C. § 1. Jurisdiction in the District Court was based upon 28 U.S.C. §§ 1337 and 1332. The case was tried in July and August, 1981, resulting in a directed verdict in Michelin's favor.

As to Bostick's Sherman Act § 1 claim, the District Court concluded that Bostick had failed to produce cogent evidence to support a finding of conspiracy. Although there was evidence of widespread complaints by other Michelin dealers about Bostick, the District Court found there was no evidence to connect those general complaints with Michelin's decision not to renew Bostick as a dealer. The Court wrote:

> Indeed, all of the evidence is to the contrary . . . As conceded by plaintiff's counsel, this [the fact that there was no response by Michelin to complaints about Bostick] is in contrast to the finding of *D. B. Rice Tire Company v. Michelin Tire Corp.*, 483 F.Supp. 750 (D.Md. 1980), aff'd 638 F.2d 15. The essential causal connection between complaints and the action taken by defendant, which was present in *Rice* and in *Girardi v. Gates Rubber Co.*, 325 F.2d 196 (9th Cir. 1963), is absent here . . . On the state of this record, no conspiracy or combination can be found. (App. C p. A-38)

Absent a causal connection between complaints and non-renewal, the District Court held that no Section 1 contract, combination or conspiracy in restraint of trade could be found. The Court observed, "Mere complaints do not a conspiracy make," and explained its reasoning thusly:

> Common sense tells us that complaints from buyers and sellers about each other and about their competitors are to be expected in the marketplace. . . . They are, in fact, "rational market behavior." . . . The unsolicited behavior of other dealers therefore cannot serve as the basis for Section 1 liability. Mere complaints cannot support an inference of conspiracy. (App. C p. A-38) (Citations omitted.)

The District Court further concluded that the evidence could not support a finding of a *per se* illegal restraint of trade on Michelin's part. The National Account Program, on which Bostick rested its argument of *per se* illegality, operated neither as a price maintenance device nor as a customer restriction. The

only conclusion which a factfinder might draw from the evidence presented by the plaintiff, according to the District Court, was that "Michelin did not intend to, could not and did not control the prices of tires sold to National Account customers under the National Account Program." On this record no *per se* illegal price maintenance scheme could be found.

The Court of Appeals reversed both findings and held:

1. A showing of a manufacturer's receipt of complaints about a dealer, coupled with the dealer's later non-renewal by the manufacturer, supports an inference of an illegal conspiracy to restrain trade under Section 1 of the Sherman Act. (App. A., p. A-11)
2. Michelin's vertically-imposed National Accounts billing program may constitute a *per se* illegal price maintenance scheme based on its potential to insulate dealers from customers in pricing matters and the opportunity it may present for Michelin to monitor dealers' sales tactics and policies.(App. A, p. A-16)

Following the Order of the Court of Appeals on March 14, 1983, Michelin filed a Petition and Supplemental Petition for Rehearing, and Bostick filed a response. On May 23, 1983, the Court entered its Order denying Michelin's Petitions, with Judges Russell, Widener, Hall and Chapman noting their dissent to the denial.

REASONS FOR GRANTING THE WRIT

This case presents two unusually strong reasons for granting the writ of certiorari.

First, in adopting a position on Section 1 proof of conspiracy which disregards the necessary causal connection between complaints and non-renewal, the Fourth Circuit has adopted an extreme, minority position which is in direct and irreconcilable conflict with the majority position adopted by the Courts of Appeal for the First, Second, Third, Fifth, Sixth, Eighth, Ninth and Tenth Circuits. Only the Seventh Circuit adheres to the

position adopted by the Fourth Circuit here, *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226 (7th Cir. 1982), cert. granted, 103 S. Ct. 1249 (1983), and that decision is currently under review by this court.

Second, in concluding that Michelin's National Account Program may constitute a *per se* illegal restraint, the Fourth Circuit is in conflict with the decision of this Court in *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1 (1979).

Either reason presents a significant ground for review by this Court; in combination, they are compelling.

I.

In this case, the Court of Appeals concluded that "proof of termination following competitor complaints is sufficient to support an inference of concerted action." (App. A p. A-11) Even in the absence of evidence to demonstrate that complaints motivated Bostick's non-renewal as a Michelin dealer, the Fourth Circuit concluded that an inference of conspiracy was supportable. This holding represents the extreme minority position, shared only by the Court of Appeals for the Seventh Circuit.

The majority rule, specifically adopted by the Courts of Appeal for the First, Second, Third, Fifth, Sixth, Eighth, Ninth and Tenth Circuits, and now rejected by the Fourth Circuit, is that a manufacturer's knowledge of complaints, coupled with termination, will not support an inference of conspiracy under Section 1 of the Sherman Act. Instead, there must be specific, probative evidence that the complaints caused or contributed to the dealer's termination or non-renewal. A review of relevant decisions among the Courts of Appeal demonstrates the weight of precedent supporting the majority view:

First Circuit: In *Bruce Drug, Inc. v. Hollister*, 688 F.2d 853 (1982), the Court held, "The mere existence of complaints in a supplier's files . . . is insufficient . . . to sustain the inference that a dealer was terminated because of them, or because of a conspiracy."

Second Circuit: In *H. L. Moore Drug Exchange v.*

Eli Lilly & Co., 662 F.2d 935 (1981), the Court declared, "Even where a termination follows the receipt of complaints . . ., there is no basis for inferring the existence of concerted action, absent some other evidence of a tacit understanding or agreement with (the complainants)." The Court reached the same conclusion in *Venture Technology, Inc. v. National Fuel Gas Co.*, 685 F.2d 41 (1982), *Schwimmer v. Sony Corp. of America*, 677 F.2d 946 (1982), and *Borger v. Yamaha International Corp.*, 625 F.2d 390 (1980).

Third Circuit: The landmark case in the Third Circuit is *E. J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105 (1980), in which the majority rule was enunciated. The Court's position was reinforced in *Tose v. First National Pennsylvania Bank*, 648 F.2d 879 (1982).

Fifth Circuit: The Fifth Circuit made its position on this issue clear in *Sports Center, Inc. v. Riddell, Inc.*, 673 F.2d 786 (1982), and echoed the majority rule.

Sixth Circuit: The majority rule was adopted by the Sixth Circuit in *Davis-Watkins Co. v. Service Merchandise*, 686 F.2d 1190 (1982).

Eighth Circuit: A dichotomy which arose from two panels adopting opposite standards on the same day (Compare *Roesch, Inc. v. Star Cooler Corp.*, 671 F.2d 1168 (1982) (majority rule) with *Battle v. Lubrizol Corp.*, 673 F.2d 984 (1982) (minority rule), has now been resolved in favor of the majority rule, by rehearing *en banc* decisions in both cases filed July 12, 1983.

Ninth Circuit: In *Filco v. Amana Refrigeration, Inc.*, ____ F.2d ____ (1983), the Court of Appeals for the Ninth Circuit recently concluded, "competitor complaints plus termination is not sufficient evidence to raise an inference of unlawful conspiracy or combination. To rule otherwise would subject manufacturers to vexatious litigation because every terminated discounting distributor probably could point to complaints made by his competitors."

Tenth Circuit: The Second Circuit's decision in *Borger v. Yamaha International Corp.*, *supra*, formed the basis for the

Tenth Circuit's adoption of the majority rule in *Blankenship v. Herzfeld*, 661 F.2d 840 (1981).

In support of its conclusion in this case, the Fourth Circuit cited *Spray-Rite Service Corp. v. Monsanto Co.*, *supra*, a strikingly similar case, now before this Court on writ of certiorari to the Seventh Circuit. The issue presented in both this case and *Spray-Rite* is crucial to antitrust conspiracy cases: Will evidence of a manufacturer's receipt of complaints against a distributor, coupled with that distributor's later termination or non-renewal, suffice as evidence of a contract, combination or conspiracy in restraint of trade for purposes of Section 1 of the Sherman Act, notwithstanding the absence of evidence to establish a causal connection between complaints and non-renewal? The answer must be no. As the Court observed in *E. J. Sweeney & Sons, Inc. v. Texaco, Inc.*, *supra*, at 257-258:

> It would be inequitable to hold that the mere receipt of the complaint creates an inference of a combination between the recipient and the complainant. The recipient of the complaint cannot help receiving the complaint and it would be unfair, without additional evidence of the existence of the conspiracy, to hold him liable for something over which he has no control.

This issue, one of central importance to Sherman Act Section 1 cases, and the subject of sharp division among the Courts of Appeal, warrants determination by this honorable Court.

II.

In *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1 (1979), this Court warned against the hazards of woodenly applying the rule of *per se* illegality under Section 1 of the Sherman Act to business arrangements which might be characterized as "price fixing." The Court wrote:

> [I]n characterizing this conduct under the *per se* rule, our inquiry must focus on whether the effect and . . . the purpose of the practice is to threaten the proper operation of our predominantly free market economy—

> that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . .

Here, the Court of Appeals concluded that Michelin's National Account marketing program could be *per se* illegal under Section 1 of the Sherman Act solely because it *may* insulate dealers from customers in pricing matters and *may* give Michelin an opportunity for monitoring dealers' sales tactics and policies (App. A p. A-16). The Court of Appeals has concluded that if a marketing program merely has the *potential* to act as a resale price maintenance device, it may be *per se* illegal. There has not yet been any attempt to address the actual operation of the program in the marketplace, nor has there been any discussion of the purpose of the program. The Fourth Circuit has in fact ignored the standards set forth by this Court in its *Broadcast Music* decision.

CONCLUSION

The issues raised in this case are the subject of dissention among the circuits and are central to antitrust cases. By granting this Petition, the Court may both settle a material disagreement among the Circuits and announce the extent to which the realities of the marketplace should be recognized in antitrust litigation. For these reasons, the Petitioner respectfully submits that this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1985

Bostick Oil Company, Inc.,

Appellant,

v.

Michelin Tire Corporation, Commercial Division,

Appellee.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Robert W. Hemphill, Senior District Judge.

Argued December 9, 1982 Decided March 14, 1983

Before WINTER, Chief Judge, PHILLIPS, Circuit Judge, and BUTZNER, Senior Circuit Judge.

Robert E. Staton (Michael H. Quinn, Quinn, Brown, Staton & Boyle on brief) for Appellant; O. Doyle Martin (Natalma M. McKnew, Leatherwood, Walker, Todd & Mann; James M. Micali, Assistant General Counsel on brief) for Appellee.

WINTER, Chief Judge:

Bostick Oil Company, Inc., (Bostick) brought this private antitrust suit under various federal and state statutes when the Michelin Tire Corporation, Commercial Division, (Michelin) terminated Bostick's contract as a distributor of Michelin truck tires. At the close of Bostick's evidence at trial, the district court granted Michelin's motion for a directed verdict on the causes of action then remaining:[1] attempt to monopolize under § 2 of the Sherman Act, 15 U.S.C. § 2; contract, combination or conspiracy in restraint of trade, in violation of § 1 of the Sherman Act; and, unfair or deceptive trade practices violating the South Carolina Unfair Trade Practices Act, § 39-5-20(a), Code of Laws of South Carolina 1976. Bostick appeals only from the judgment entered against it on its state law claim and on its two theories of the § 1 Sherman Act violations,[2] asserting that sufficient evidence was introduced to warrant submission of these issues to the jury. We agree, and therefore reverse and remand for a new trial. Because of our disposition of this appeal, we need address only briefly an evidentiary issue also raised by Bostick.

I.

In reviewing the grant of a motion for directed verdict under Rule 50(a), Fed. R. Civ. P., we view all evidence presented by

[1] By consent of the parties, a claim for breach of contract and a counterclaim for abuse of process had been dismissed with prejudice prior to trial.

[2] Michelin maintains that only one theory of § 1 liability, regarding Bostick's termination as a result of pressure on Michelin from complaints by competing distributors, was presented in the pleadings and at trial, so that Bostick should now be foreclosed from arguing that the evidence also supports finding Michelin liable for a resale price maintenance arrangement. Although there may have been some imprecision below as to whether Bostick presented two separate theories or merely two types of evidence in support of a single theory, it is apparent from the district court's memorandum opinion that the resale price maintenance theory was argued by Bostick as a distinct basis for liability. Where the evidence "as developed provides a basis for recovery not covered strictly by the pleadings", the pleadings are treated as conforming to the evidence. Keefe Bros. v. Teamsters Local Union No. 592, 562 F.2d 298, 306 and n. 11 (4 Cir. 1977). Rule 15(b), Fed. R. Civ. P., to dispel any doubt, Bostick formally moved to amend the pleadings at oral argument, as it is allowed to do. *See generally* 6 Wright & Miller, *Federal Practice and Procedure*, Civil § 1494. We therefore consider both § 1 theories.

Bostick, the nonmoving party, in the light most favorable to it, drawing all reasonable inferences in Bostick's favor, Ard v. Seaboard Coast Line Railroad Company, 487 F.2d 456, 457 (4 Cir. 1973), without weighing the credibility of witnesses. Old Dominion Stevedoring Corp. v. Polskie Linie Oceaniczne, 386 F.2d 193, 197 (4 Cir. 1967).

Bostick was at one time a small, family-owned oil concern based in Estill, South Carolina, which began shifting its focus to tire sales in 1967. By 1974, Bostick was offering for sale a wide range of passenger car tires and some truck tires. In April 1974, Bostick contacted Michelin, seeking to become an authorized distributor. Michelin, the marketing division of the Michelin Tire Corporation, was then expanding distribution of its radial tires and related products through numerous distributorship arrangements.[1] Responding to the inquiry, Michelin sent its district truck tire sales manager to Estill to survey Bostick's operation and prepare a dealership application. The Michelin representative noted, among other items, the type of tire service available from Bostick. Bostick's application was approved, and it entered the first of four successive one-year standard form Dealer Sales Agreement (DSA) contracts with Michelin on May 29, 1974, authorizing it to sell both passenger and truck tires.

Beginning sometime in 1975 with the employment of an experienced truck tire saleswoman, Bostick shifted the vast majority of its Michelin business into truck tire sales. During its first calendar year as a Michelin dealer, Bostick sold approximately $38,000 in truck tires and $39,000 in passenger tires of that brand.[2] For the calendar year 1976, Bostick's gross sales of truck and light truck tires had soared to slightly over $1,100,000

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[1]A more detailed chronicle of the French tire manufacturer's expansion into the American market can be found in Donald B. Rice Tire Company v. Michelin Tire Corporation, 483 F. Supp. 750, 752-53 (D. Md. 1980), *aff'd*, 638 F.2d 15 (4 Cir.), *cert. denied*, 454 U.S. 864 (1981).

[2]These figures actually represent Bostick's purchases of Michelin tires through the end of 1974, but they are indicative of its sales. By its method of operation, Bostick bought from Michelin those tires for which it had orders, rather than carrying a large stock. Company president Joe Bostick estimated each figure in the $40,000 range when testifying from memory.

as compared to $936,827 in passenger tire sales, according to a memorandum written by Michelin's corporate sales manager for the Eastern United States. By the end of April 1978, its last fiscal year as a Michelin dealer, Bostick had sold approximately $2,000,000 worth of Michelin truck tires during the preceding twelve months. The initial impetus for this shift to truck tire sales, according to company president Joe Bostick, came from Michelin's local sales representative during 1974 and 1975, as well as the enticing quantity discounts and commissions built into Michelin's pricing structure.

In expanding its business, Bostick employed the practice of "drop-shipping", i.e., transferring the tires to the purchaser by taking an order and having tires shipped directly, without providing an initial mounting or other service. Although one provision of the Dealer Sales Agreement required Bostick to maintain facilities sufficient to "enabl [e the] Dealer to sell and service Michelin Products in a first class manner", Bostick introduced the testimony of several major truck fleet-owning customers to explain that such purchasers usually maintained their own service facilities. Joe Bostick also testified that his company maintained a service arrangement with a mechanic in Estill, and had received virtually no complaints about a lack of service from customers during the period it was a Michelin dealer.

Bostick's primary method of expanding sales was through its aggressive price cutting and rebating of commissions and quantity discounts to its customers. Until the summer of 1977, Michelin offered dealers truck tires at a basic price of 22 percent off of the manufacturer's suggested list price. From this "net billing price," Bostick or any dealer was able to subtract up to an additional 9 percent for a quantity purchase, another 2 percent discount for early payment to Michelin, and a further 2 percent discount if certain shipping arrangements were made.[3] Thus, Bostick was able to give as much as a 6 percent discount to the

[3]There was also the potential for a 5 percent calendar year bonus if sales reached a certain volume. During the period until mid-1977, Bostick apparently never reached the requisite volume, its allegation that a quantity bonus was earned but unpaid was in part the subject of one of the claims not at issue in this appeal.

purchaser off of the "net billing price" and still sell at a gross profit; in effect, Bostick could buy a tire listed by the manufacturer as worth $100 for approximately $68, offering it for as low as approximately $73.30, while a dealer taking no advantage of discounts would have to sell the tire for $83.30 for a comparable total return on each unit sold.[8]

Bostick's sales practices provoked complaints by various competing Michelin dealers to field and district level personnel of the tire company. One general manager of a Charleston, South Carolina, Michelin dealer during the period 1974 to 1978 testified that he had complained to Michelin of Bostick's "coming into the Charleston area and selling truck tires at prices much below what we were selling them for." Three other South Carolina Michelin dealers testified to having complained to Michelin personnel about Bostick's low prices forcing them to decrease their profit margins to compete; one stated that he preferred buying from Bostick as a wholesale supplier because in small quantities it proved cheaper and more convenient than buying directly from Michelin. Several of these dealers on cross-examination gave some support to Michelin's contention that Bostick's lack of service facilities resulted in their having to provide service to Michelin tire owners who had bought the product elsewhere. But one of the dealers explained that the cost of the tire did not reflect the cost of future service, for which the customer was charged separately as provided, and that service had become for that dealer "a big key to our growth" representing approximately 50 percent of his total business volume.

Internal Michelin memoranda, and testimony of Michelin personnel at various levels, showed that numerous such complaints were passed along to middle and upper-level manage-

[8] Of course, for a comparable percentage markup based on the cost of the tire (i.e., approximately 7.8 percent), the other dealer would have charged roughly $84.00. In addition, the discount price available to Bostick may have been better still; the evidence was unclear whether the additional discounts were taken from the assumed $78 net billing price, from the $100 list price, or from the net price to Bostick after each prior discount was figured. The figures used here as examples reflect the most conservative manner of calculating the discount.

ment, as well as being originated by Michelin field and sales representatives themselves. As early as August 1975, a field representative's monthly report to management quoted Bostick's discount pricing and noted that another dealer "will not meet this price." By the spring of 1976, complaints about Bostick had reached Jean Pierre Duleyrie, Michelin's vice-president in charge of sales, prompting him to send a corporate sales manager (the Michelin official immediately below Duleyrie) to talk directly with Joe Bostick in April 1976. Though the actual motivation behind the meeting and its contents were much in dispute at trial, the outcome was a renewal of Bostick's dealership for 1976-77 and possibly a promise by Bostick to expand service facilities. The complaints by competitors and Michelin sales personnel nonetheless persisted during the remainder of Bostick's distributorship.

Shortly before the May 29 renewal date of Bostick's dealership contract in 1977, Michelin's district manager approached Joe Bostick to explain the company's proposal to enroll Bostick in a "National Accounts" program. Various large-volume purchasers designated "national accounts" were billed and their accounts collected centrally through Michelin, while distributors such as Bostick continued to perform the actual selling and delivery of tires for which they were paid a commission. Participation in the program required disclosure of customer lists to Michelin, and loss of the ability in the first instance to quote a price for the tires. Continuation as a Michelin dealer was not made expressly conditional on joining the National Accounts program; by the stated terms, a dealer could continue to sell to some accounts as before and list others as National Accounts in any desired mix.

Michelin explained, through cross-examination, that the National Accounts pricing structure proved capable of giving a dealer an advantage over the regular distribution terms. A National Accounts customer was billed by Michelin at a 20 percent discount off the list price; the dealer who delivered the tire from his stock was credited by Michelin at 22 percent off suggested list price and was paid a 12 percent commission on each National

Accounts tire sold." Thus the dealer could rebate a substantial part of the commission to the National Accounts customer and in effect reduce the price of the tire below that of a direct sale from the dealer. Bostick, as an aggressive seller, eventually gave from half to all of the commission back to its National Accounts customers in the form of rebates. Michelin officially did not disclose the price it charged the customer, although the suggested price list apparently was easily obtainable from customers.

Despite the eventual attractiveness of National Accounts sales to Bostick, Joe Bostick testified that he personally had felt "intimidated" into joining the National Accounts program during meetings near dealership renewal time in 1977.[2] In support of this contention, Bostick introduced the recommendation in the April 1977 monthly report of Michelin district manager Elroy Earl "Pete" Christensen, Jr. to "management" that Bostick not be renewed as a dealer. During April and May, Christensen, despite frequent contact, refused to answer Joe Bostick's inquiries as to whether or not the dealership would be renewed. On May 28, 1977, with Michelin representatives still seeking to enroll Bostick in the National Accounts program, the dealership legally expired. On June 7, 1977, Bostick made its first sale through the National Accounts program, and actual dealership renewal followed on June 14. Contemporaneously, Christensen noted in a semi-annual June 1977 planning report to management that encouragement from Michelin representatives to larger purchasers to participate in the National Accounts program "should help a great deal in the area where dealers are wholesaling and dropping off."

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[1] In actual practice, much of the financial relationship between dealer and Michelin was accomplished through accounting for tires "bought" and "sold" on each company's books. The record does not reflect clearly at what point cash actually flowed between the companies, but the practical effect on Bostick's credit with Michelin was as described here.

[2] Michelin has argued before us that Joe Bostick's testimony was "incredible" given his business acumen. While that may well be the case, we think, as we explain more fully below, that the issue remains one of many for resolution by the jury. For the most part, moreover, Bostick's subjective feeling of intimidation is of little relevance, as there is sufficient objective evidence from which a jury could conclude that as a matter of fact dealership renewal was being held up until Bostick acquiesced in joining the National Accounts program.

A preceding portion of the same memorandum identified Bostick as "the most pressing problem" in the district and expressed optimism over Bostick's recent willingness to enter the National Accounts program.

Michelin's enthusiasm over Bostick's National Accounts participation soon waned. Christensen's July 1977 report expressed concern over Bostick's solicitation of existing customers for National Accounts treatment and noted that Bostick had begun giving rebates as high as 15 percent on purchases program. Internal memoranda were also directed to management complaining that Bostick was purchasing tires from a Canadian source and selling them through the National Accounts program; the Michelin corporate sales manager informed district manager Christensen that although "we can do nothing legally" about the practice "you will ask him kindly not to do so."

Complaints about Bostick's merchandising tactics continued to be reported to Michelin management throughout 1977-78. Finally, for reasons that are the central subject of this dispute, Michelin representatives notified Bostick in April 1978, that its truck tire dealership would not be renewed in May, although continuation of passenger and light truck tire distributorship was offered. Bostick refused the limited dealership offer and instead brought this suit on May 26, 1978.

II.

Bostick asserts claims under § 1 of the Sherman Act on essentially two distinct but related theories. The first is that Bostick was eventually terminated as a dealer because Michelin heeded the complaints of Bostick's competitors, who were threatened by Bostick's ability to undersell them. The alternative theory is that the National Accounts program was a resale price maintenance scheme, and to enforce it Michelin terminated Bostick, a dealer who continued effectively to lower the manufacturer-imposed minimum price for its customers. The interrelationship of the two is shown by perhaps a third view, that Michelin's pressing Bostick to join the National Accounts program was a less drastic attempt at satisfying the competing deal-

ers' complaints which failed to curb Bostick's price cutting, ultimately requiring Bostick's termination. For all these claims, of course, Bostick must introduce sufficient evidence upon which a jury would be warranted in finding a "contract, combination, . . . or conspiracy" as a prerequisite to § 1 liability. 15 U.S.C. § 1; *compare* United States v. Parke, Davis & Co., 362 U.S. 29 (1960), *with* United States v. Colgate & Co., 250 U.S. 300 (1919). If such is found, it must be one which is unreasonably "in restraint of trade." Continental T.V., Inc. v. GTE Sylvania Incorporated, 433 U.S. 36 (1977). The district court believed one or the other element was lacking in plaintiff's case for each theory and so granted Michelin a directed verdict. We discuss each theory and the necessary elements seriatim.

A.

Michelin argues strenuously that mere complaints do not a conspiracy make, and cites to us cases for this proposition. *See, e.g.*, H. L. Moore Drug Exchange v. Eli Lilly and Company, 662 F.2d 935 (2 Cir. 1981), *cert. denied*, ____ U.S. ____, 103 S. Ct. 176 (1982); Roesch, Inc. v. Star Cooler Corporation, 514 F. Supp. 890 (E.D. Mo. 1981), *aff'd*, 671 F.2d 1168 (8 Cir. 1982).* Were this a proper case, we might well agree with this unstartling principle. In this case, however, the evidence elicited at trial showed more than just uninfluential competitors' complaints "standing alone", *H. L. Moore Drug*, *supra*, 662 F.2d at 941.

Antitrust civil conspiracy or combination[10] has traditionally been inferred " 'from a course of dealing or other circumstances' " in which the determinative facts are "what the parties actually did" rather than whether an express agreement existed. *Parke, Davis*, *supra*, 362 U.S. at 43-44; Eastern States Retail Lumber Dealers' Assoc. v. United States, 234 U.S. 600 (1914); Albrecht v.

*Roesch, however, holds in conflict with Battle v. Lubrizol Corp., 673 F.2d 984 (8 Cir. 1982), which was decided the same day. The Eighth Circuit granted rehearing in banc in both cases on May 21, 1982, and heard arguments in October 1982. Decision is currently pending.

[10]There is no contention that a contract was entered into between Michelin and other dealers regarding Bostick in regard to this first theory.

The Herald Co., 390 U.S. 145, 149-50 (1968). As we noted in Hester v. Martindale-Hubbell, Inc., 659 F.2d 433, 436 (4 Cir. 1981), *cert. denied*, ____ U.S. ____, 102 S. Ct. 1489 (1982), the courts, being " 'sensitive to the realities of the marketplace' . . . have extended the concept of concerted activity far beyond the classic case of actual agreement to engage in a common course of conduct." Contrary to what the district court believed, that Michelin did not expressly inform complaining dealers that it would terminate Bostick at their behest cannot be determinative.

In an analogous case we recently addressed the basis upon which the trier of fact could be permitted to find " 'the requisite degree of involvement of other parties' to infer a conspiracy under *United States v. Parke Davis & Co.*" Donald B. Rice Tire Company v. Michelin Tire Corporation, 638 F.2d 15, 16 (4 Cir.), *cert. denied*, 454 U.S. 864 (1981) (citation omitted). In *Rice*, we affirmed the district court's finding of a "combination" despite the absence of any formal manufacturer-dealers agreement, or even of evidence that rival dealers had ever been consulted by Michelin following their complaints against Rice, like Bostick a high-volume Michelin dealer eventually terminated. The evidence at that trial showed:

> Jean Pierre Duleyrie, the Vice-President in charge of sales, and the individual primarily responsible for the nonrenewal decision conceded that complaints from Michelin sales personnel in other areas and from other tire dealers about plaintiff's geographically extensive and large-scale wholesaling activities contributed to the decision. While Michelin sales personnel do not qualify as economically distinct entities with whom defendant could conspire or contract, Fuchs Sugars & Syrups, Inc. v. Amstar Corp., 602 F.2d 1025 (2d Cir. 1979), other Michelin tire dealers do qualify. Numerous other witnesses testified that other tire dealers complained to Michelin personnel about plaintiff's activities. In light of this testimony, as well as Duleyrie's concession that no other types of complaints from any sources about any other aspects of plaintiff's business were received prior

> to the nonrenewal decision, it is apparent that a combination existed for the purposes of § 1 between Michelin and some of its authorized dealers.

Rice v. Michelin Tire, *supra*, 483 F. Supp. at 754. The evidence adduced in the instant case, as we have summarized it, was quite similar.

As in *Rice*, the testimony of Mr. Duleyrie, Michelin's sales vice president during the relevant time period, shows personal knowledge of the complaints and discussions between Bostick and Michelin's district manager leading up to the renewal decision in 1976. Speaking generally, Duleyrie admitted hearing of complaints by other dealers about Bostick's underselling them "all the time," although he characterized such complaints as "everyday-type" to which "our people are instructed not to pay attention." He also conceded, "I don't know of any instances where Bostick was asked to perform service and failed to do it."[11]

Mr. Duleyrie's knowledge of the complaints, and his direction of subordinates to take various actions in response, can also be inferred from admitted knowledge of the situation and directives to local Michelin officials by the regional corporate sales manager, who reported directly to and took orders from Mr. Duleyrie. Michelin's own theory of the termination—that it was merely responding to the disillusionment of other dealers stemming from Bostick's lack of service facilities—implicitly recognizes that the termination was something more than a unilaterally motivated action. Thus, even absent an express "concession" from Mr. Duleyrie, a reasonable jury could find a " 'causal nexus' " between the complaints and the termination without speculating about the involvement of rival dealers. Roesch v. Star Cooler, *supra*, 514 F. Supp. at 894. Indeed, the Seventh Circuit in a highly lucid discussion of § 1 liability predicted upon termination of a dealer has held "that proof of termination following competitor complaints is sufficient to support an inference of concerted

[11] When questioned about Bostick's lack of service facilities as a basis for termination when other dealers without service facilities were assertedly allowed to continue, Mr. Duleyrie stated that "we took exactly the same type of action that was taken in the Bostick oil case" in terminating Rice as a dealer.

action." Spray-Rite Service Corp. v. Monsanto Co., 684 F.2d 1226, 1238 (7 Cir. 1982). And we have previously found that a termination even more unilateral in nature could constitute a § 1 violation if it evinces sufficient anticompetitive character. Osborn v. Sinclair Refining Company, 286 F.2d 832, 837 (4 Cir. 1960), *cert. denied*, 366 U.S. 963 (1961).[12]

It is ultimately, then, a factual issue for the jury to determine whether Bostick was terminated to placate rival dealers objecting to price-cutting, or instead for lack of service facilities as Michelin claims.[13] The question next to be considered is whether termination for either purpose is a violation of § 1.

The answer is found in *Rice*,[14] where we said:

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[12]Michelin contends that to rule for Bostick we must necessarily embrace an expansive reading of Girardi v. Gates Rubber Company Sales Division, Inc., 325 F.2d 196 (9 Cir. 1963), and that *Girardi* has been sapped of precedential value by universal criticism. Neither is true. *Girardi* perhaps can be read quite broadly as in effect creating a presumption of combination or conspiracy whenever distributors' complaints are followed by a supplier's termination of the disfavored rival distributor. But we need not adopt such a presumption here to require submission of the case to the jury in the face of other evidence, beyond bald complaints, upon which a causal connection between the competitors' objections to price-cutting and the termination could be found. Also, those cases cited as rejecting *Girardi*, *see, e.g.*, Roesch v. Star Cooler, *supra*, 671 F.2d at 1172; E. J. Sweeney & Sons, Inc. v. Texaco, Inc., 478 F. Supp. 243, 256 (E.D. Pa. 1979), *aff'd*, 637 F.2d 105 (3 Cir. 1980), *cert. denied*, 451 U.S. 911 (1981), in actuality only criticize the expansive view of that case, while preserving the narrower point that such other evidence as we find here will be enough to raise an issue of fact regarding § 1 concerted activity. And the Seventh Circuit has refused to follow the stringent proof requirements set out in *Sweeney*, *see Spray-Rite*, *supra*, 684 F.2d at 1238-39, while the authority of *Roesch* is in doubt pending the Eighth Circuit's resolution of its in banc hearing. *See supra* note 9; *Spray-Rite*, *supra*, 684 F.2d at 1239 n.7.

[13]Or, for that matter, for a third reason as yet undisclosed by Michelin.

[14]Bostick does not challenge on appeal the service clause in his Dealer Sales Agreement as itself an unreasonable restraint of trade, as did the plaintiff in *Rice*. The district court in *Rice* had found that defendant's evidence, *in rebuttal* to the plaintiff's evidence of a horizontal combination among rival dealers, showed that Rice had underspent on Michelin promotional activities and, although maintaining "adequate" service facilities, had effectively shifted much of the tire service and repair work it could have been expected to perform on to other dealers. 483 F. Supp. at 757-59. These service and promotional deficiencies therefore were found to create a "free-rider" problem, *see, e.g.*, *GTE Sylvania*, *supra*, 433 U.S. at 55, justifying enforcement of Michelin's contractual requirements, and hence the termination of Rice. But the reasonableness of the clause did not come into question until a *prima facie* case of a horizontal combination as the impetus to the termination had first been shown.

> [W]e think it is important to distinguish between a conspiracy among dealers and their supplying manufacturer for the purpose of retail price maintenance that would benefit the dealers and one involving the same parties but redounding primarily to the benefit of the manufacturer as a result of increased interbrand competition. A restraint imposed by the former conspiracy would be horizontal in nature and *per se* illegal, while one imposed by the latter would be vertical and analyzed under the rule of reason.

638 F.2d at 16. On the authority of *Rice*, we conclude that a finding of *per se* violation of § 1 would result from a factual determination that the termination was in furtherance of competitors' desires to eliminate a price-cutting rival. Com-Tel, Inc. v. DuKane Corp., 669 F.2d 404, 411-13, (6 Cir. 1982); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); United States v. General Motors Corp., 384 U.S. 127 (1966). While we are not unmindful that a *per se* label should not be mechanically applied, Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 9 (1979); National Electrical Contractors Assoc., Inc. v. National Constructors Assoc., 678 F.2d 492, 500 (4 Cir. 1982), where the facts support a finding that competing distributors provoked a manufacturer to eliminate one of their number as a marketplace competitor, there is no need to proceed to the more finely tuned "rule of reason" analysis that is proper when considering manufacturer-imposed vertical restrictions like the tire service requirement in *Rice*.

Of course, it is possible that the jury will reject Bostick's proof and instead find that termination occurred for the reasons Michelin claims. Michelin has yet to put on its proof, and had, by cross-examination, only begun to draw out evidence to support its defense. In *Rice*, by way of illustration, Michelin eventually failed to convince the trier of fact of the applicability of two of the three explantions for viewing the termination as a vertically imposed manufacturers' restraint promoting competition against

other tire brands.[17] Only the "free rider" justification was proven, a justification yet to emerge as applicable here; although some rival dealers' dissatisfaction with Bostick apparently stemmed from the perception that Bostick's minimal service facilities allowed it a cost advantage, at least one dealer claimed a benefit from an expansion in the service portion of his business. Whether provision of Michelin service paid for itself or even produced a profit for other dealers will be a matter the parties will be free to explore at a new trial. We find only that the evidence so far submitted rendered the court's grant of a directed verdict erroneous.

B.

Analysis of the National Accounts program presents no problem in finding the concerted action element of a § 1 violation, as the program itself was a contractual agreement between Michelin and various of its dealers including Bostick.[18] More difficult is the issue of whether the program operated as an unreasonable restraint of trade. The district court reasoned that the program fell short of a *per se* illegal resale price maintenance arrangement, *see, e.g., Parke, Davis, supra*, 362 U.S. 29, for two reasons: (1) the program was voluntary in that dealers could join or not, or only partially, and remain dealers, and (2) no minimum resale price was set by Michelin given that Bostick could effectively

[17] In *Rice*, the district court considered whether Michelin's actions fell within any of the three rationales discussed in *GTE Sylvania, supra*, 433 U.S. at 55-56, as justifying restrictions or policies enhancing competition among different product manufacturers ("interbrand") at the expense of lessened competition among dealers of the same brand ("intrabrand"). These rationales were (1) inducing aggressive retailers to become dealers to enhance the manufacturer's likelihood of successful entry into a new market, (2) stemming the "free rider" effect, *see supra* note 13, and (3) assuming direct manufacturer oversight of quality and safety to lessen product liability exposure. In affirming *Rice*, we noted carefully that such actual positive benefits must be shown before a restraint imposed by a manufacturer is accorded the deference of a "rule of reason" analysis. 638 F.2d at 16.

[18] In addition, the program appears to be the kind of arrangement in which no single dealer can be sufficiently assured of not losing a competitive advantage in joining unless competing dealers also join. To this extent there is an additional element of "combination" involved, *see Albrecht, supra*, 390 U.S. 145, one which goes "beyond mere announcement of [the manufacturer's] policy and the simple refusal to deal" allowed under the doctrine announced in *Colgate, supra*, 250 U.S. 300. *Parke, Davis, supra*, 362 U.S. at 44.

alter the final sales "price" by rebating to his customers. Were these two salient features of the National Accounts program uncontestably true, we would agree with the district court that a central billing program by a manufacturer is not *per se* illegal under the Sherman Act.[17] *See* Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc., 585 F.2d 821 (7 Cir. 1978), *cert. denied*, 440 U.S. 930 (1979); *cf.* B.M.I. v. C.B.S., *supra*, 441 U.S. 1. But the evidence so far presented permitted a contrary finding.

The voluntariness of the program in a formal sense was not a proper basis for the granting of a directed verdict when Bostick had introduced sufficient evidence of Michelin's efforts to pressure it into joining the program unwillingly. Such evidence can be found in the simultaneous refusal of Michelin to disclose its intention to renew or terminate the dealership while vigorously promoting the virtues of the National Accounts program; the delay in formalizing renewal past the usual May 29 anniversary until mid-June in 1977, *after* Bostick had made its first sale through the National Accounts program and had begun to express an interest in participating; and to some degree Joe Bostick's own account of feeling "intimidated" by Michelin representatives at pre-renewal meetings where the possibility of termination for failure to join the National Accounts program was assertedly conveyed to him.[18] Moreover, although large-volume customers were ostensibly free to choose to join the program and dealers free to solicit national accounts for business, Michelin soon became critical of Bostick's active promotion of itself as a National Accounts dealer.

As to Michelin's lack of control over the ultimate sales price, the evidence is not at all clear that Michelin anticipated the availability of an "end run" around the central pricing and billing system directly to the customer through rebates by Bostick. Even

[17] Because of the posture of this case we are not called upon to determine whether the potential for resale price maintenance of a central pricing and billing system is justified as in effect creating a new "product", *see, e.g.*, B.M.I. v. C.B.S., *supra*, 441 U.S. 1, or as promoting interbrand competition through economies of scale in a manner that cannot be achieved through less restrictive alternatives, *see e.g.*, *GTE Sylvania*, *supra*, 433 U.S. 36.

[18] *See supra* note 8.

if the potential for dealer rebating was perceived in advance, Michelin personnel showed considerable disenchantment with Bostick's continued price-cutting. That Bostick was eventually able to turn the program to its advantage once enrolled does not imply that its participation was not initially urged as a means of dampening its ability to discount. The record reveals frustration and attempts by Michelin during 1977-78 to exert indirect pressures on Bostick to curtail its sales practices. A jury could reasonably conclude that the nonrenewal in May 1978 was a last resort by Michelin to bring a maverick into line and make the National Accounts program *as enforced* an effective barrier to dealer price competition.

Accordingly we conclude that proof of an illegal resale price maintenance arrangement does not rest upon a showing that the National Accounts program in its structure on paper restricts market pricing if in practical effect the "coercive potential of summary termination" keeps discounting dealers in line. Greene v. General Foods Corp., 517 F.2d 635, 658 (5 Cir. 1975), *cert. denied*, 424 U.S. 942 (1976). Price maintenance schemes have been consistently condemned as *per se* illegal, Arizona v. Maricopa County Medical Society, ____ U.S. ____, 50 U.S.L.W. 4687 (1982); *Albrecht*, *supra*, 390 U.S. 145, Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211 (1951); United States v. Trenton Potteries, 273 U.S. 392 (1927), and are not saved by claims of redeeming interbrand virtues when there is sufficient evidence of their initiation at the instigation of horizontally competing entities. United States v. Topco Associates, Inc., 405 U.S. 596 (1972). Michelin, of course, is not generally a dealers' collective or joint venture of competitors. But in establishing a National Accounts billing program involving review of dealers' customer lists, the setting of uniform prices to all participating customers, the potential for insulation of the dealer from the customer in pricing matters, and an opportunity for monitoring dealers' sales tactics and policies in greater depth, it has taken on this role of a regulator of the horizontal competition among otherwise legally distinct dealerships selling tires they legally own.* *See* United

*Indeed, the apparent justification for Michelin acting as billing clearinghouse for its dealers is that joint efforts in this area benefit dealers as a whole

States v. Sealy, Inc., 388 U.S. 350 (1967). If the cancellation of Bostick is found to have been for the reasons claimed in this suit, a violation of § 1 of the Sherman Act was committed.

C.

From the foregoing the outlines of a third view of the evidence becomes clear without need for great elaboration. Even if the National Accounts program itself was insufficient to constitute a resale price maintenance arrangement, Michelin's insistence on Bostick's participation can be understood as a first attempt to carry out the wishes of competing dealers. As Bostick's discounting continued, so did complaints. The ultimate cancellation of only Bostick's truck dealership was a more drastic second step in an essentially horizontal effort to remove downward pressure on Michelin truck tires. That Michelin offered to continue Bostick as a passenger and light truck tire distributor could be taken as signaling a desire to take steps strong enough to placate other dealers but not so drastic as to lose itself a highly effective dealer outright.[20] Viewing Michelin's entire course of dealing with Bostick as a consistent two-stage progression, a jury could find the termination in furtherance of a horizontal combination with anticompetitive effect.[21]

[20]Michelin suggested at oral argument that Bostick's various "Dr. Tire" retail outlets provided sufficient service facilities to satisfy the Dealer Sales Agreement. This may be established on remand; evidence currently in the record is at best minimal on this point, and certainly inconclusive.

[21]Further supporting this conclusion is the Supreme Court's observation in *GTE Sylvania*, *supra*, 433 U.S. at 56, that many economists "have argued that manufacturers have an economic interest in maintaining as much intrabrand competition as is consistent with the efficient distribution of their products." Because the National Accounts program dampens intrabrand price competition, which is only then reinvigorated by rebating, it could follow that it was contrary to Michelin's interests standing alone to terminate an effective intrabrand competitor like Bostick. The jury could thus infer that Michelin was instead responding to the pressures from Bostick's competitors, who had more reason to oppose strong intrabrand competition than Michelin, especially if it doubted Michelin's service-related justification in this case.

III.

Bostick also urges that the facts underlying its Sherman Act claims equally support a finding of liability under the South Carolina Unfair Trade Practices Act, § 39-5-10 *et seq.*, Code of Laws of South Carolina 1976. Specifically, § 39-5-20(a) provides:

> Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

Bostick contends that a jury could have found that its nonrenewal was "contrary to equity and good conscience", deTreville v. Outboard Marine Corporation, 439 F.2d 1099, 1100 (4 Cir. 1971), or, alternatively, that in dealing with Bostick, Michelin went beyond a unilateral refusal to deal to seek compliance with an anticompetitive price maintenance arrangement.[2] The district court dismissed this count on a variety of grounds which we consider in turn.

Most quickly disposed of is the district court's passing suggestion that federal law preempted application of the South Carolina Unfair Trade Practices Act. This position is untenable, and Michelin makes little effort to defend it here. Nothing in the nearly century-old history of federal antitrust regulation is cited to us to suggest that Congress has manifested a clear intent to displace state regulation of unfair trade practices. *See* 1 P. Areeda & D. Turner, Antitrust Law ¶208 (1978). *Cf.* New York State Dept. of Social Services v. Dublino, 413 U.S. 405, 413 (1973); Parker v. Brown, 317 U.S. 341, 351 (1943).

To the extent the district court relied on the inverse proposition, that the state law exempts from its coverage all federally

[2] Bostick advanced two other Unfair Trade Practices Act-based theories which are no longer tenable in this case. One was that Michelin fraudulently induced Bostick to enter the National Accounts program, a claim identical to that dismissed with prejudice below by agreement of the parties. We think that Bostick is foreclosed from reopening its fraud claim under a different heading here on appeal. The other was that Michelin restricted the territory of its dealers or to whom the product could be transferred. Bostick, however, failed to offer any proof of this, aside from perhaps a strained view of the potential of the National Accounts program as a means of overseeing dealer-customer contact. These theories were properly dismissed.

regulated conduct, the following language of § 39-5-40 governs:

> Nothing in this article shall apply to:
>
> * * *
>
> (d) Any challenged practices that are subject to, and comply with, statutes administered by the Federal Trade Commission and the rules, regulations and decisions interpreting such statutes.
>
> For the purpose of this section, *the burden of proving exemption from the provisions of this article shall be upon the person claiming the exemption.*

(emphasis added). As Bostick points out, Michelin failed to raise this defense in its answer. The above language appears to require the party claiming exemption to raise § 39-5-40(d) affirmatively,[23] such that the defense is untimely when first raised on motion for directed verdict. Rule 8(c), Fed. R. Civ. P.; Hardy-Latham v. Wellons, 415 F.2d 674, 677 (4 Cir. 1968).

Even if considered properly raised as more akin to a defense of failure to state a claim upon which relief can be granted and hence timely, Rule 12(h)(2), Fed. R. Civ. P., this exemption is not available to Michelin on the ground of its action being "subject to, and comply[ing] with" F.T.C. rules, regulations and interpretations. No case has been pointed to of Federal Trade Commission approval of the type and manner of dealer termination alleged here. Instead, some terminations are found lawful, others not, on a case-by-case basis. *Compare* Naifeh v. Ronson Art Metal Works, Inc., 218 F.2d 202, 206 (10 Cir. 1954) (simple refusal to deal not illegal), *with* Adolph Coors Company v. F.T.C., 497 F.2d 1178, 1185-86 (10 Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975) (conduct going beyond a simple refusal to deal found illegal where distributorship terminated for anti-competitive purpose).

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[23] Dealing with a pendent state law claim, we look to state law for guidance on whether the defense is affirmative in nature. Freeman v. Chevron Oil Company, 517 F.2d 201, 204 (5 Cir. 1975). As Professor Day of the University of South Carolina School of Law has summarized the procedural status of § 39-5-40: "Proof of an exemption is clearly an affirmative defense." Day, The South Carolina Unfair Trade Practices Act: Sleeping Giant or Illusive Panacea?, 33 S.C.L. Rev. 479, 501 n.147 (1982).

Section 39-5-40 instead runs to activity given a blanket exemption or endorsement by federal law.

In State ex rel. McCleod v. Rhoades, 275 S.C. 104, 267 S.E.2d 539, 541 (1980), the South Carolina Supreme Court found certain allegedly unfair stock trading practices to be within the regulatory scheme of the Securities and Exchange Act of 1934 and therefore exempted from the Unfair Trade Practices Act.[24] By contrast, where the less comprehensive Federal Motor Vehicle Information and Cost Savings Act was asserted to have exempted allegedly fraudulent automobile odometer setting practices from state law coverage, the court found that "the Federal Act clearly reveal(s) it was not intended to supersede or otherwise limit state law remedies". State ex rel. McCleod v. Fritz Waidner Sports Cars, Inc., 274 S.C. 332, 263 S.E.2d 384, 385 (1980).

Interpretation of the Act, though scant, indicates that the exemption relates only to fields extensively governed by federal law, where federal preemption might otherwise already apply. As discussed, we do not view the body of federal antitrust law as preemptive in this way, and therefore no exemption arises merely by virtue of Michelin's asserting that its conduct in a particular case might not be illegal under federal law. Michelin thus has failed to carry its burden of proving an exemption under § 39-5-40.

Looking then to the merits of Bostick's state law claim, we conclude that the district court overly restricted the Act's coverage to only those practices which would be unlawful under § 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C.

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[24]Strictly speaking, *Rhoades* addressed only the exemption provided for in § 39-5-40(a) regarding "actions or transactions permitted under laws administered by any regulatory body" of the state or the United States, and not 40(d) claimed by Michelin. As 40(d) apparently has not been interpreted by the South Carolina Supreme Court, the treatment of the broader exemption of (40)(a) discussed in the text gives guidance on the scope of the entire section. It follows that if the cause of action against Michelin is not exempted under the broader view of actions "permitted" by other law, it also fails to meet the stricter demands of alleging acts subject to and complying with criteria set forth by the FTC, itself a regulatory body administering federal law.

§ 45(a)(1).[8] The Act instead states only that "the courts will be *guided* by the interpretations given" to the federal FTC Act. § 39-5-20(b) (emphasis added). This language neither revokes pre-existing South Carolina definitions of unfair or deceptive trade practices, nor binds the Act to the scope of federal law. Pertinent, then, is our statement of South Carolina law applicable to a claim of wrongful franchise termination:

> Although some states may give full effect to broad unilateral powers of termination, South Carolina, whose law governs here, does not. It is settled law in that state that regardless of broad unilateral termination powers, the party who terminates a contract commits an actionable wrong if the manner of termination is contrary to equity and good conscience. That standard of conduct is far more stringent than one forbidding only actual fraud, and it may apply to an unconscionable reason for termination as well as to the causing of needless injury in the course of termination.

deTreville v. Outboard Marine, *supra*, 439 F.2d at 1100 (citations and footnote omitted). The principle that proof sufficient to sustain a finding of fraud need not be prerequisite to establishing an unfair trade practice has been applied directly to the Act. State ex rel. McCleod v. Brown, 294 S.E.2d 781, 783 (S.C. 1982).

Accordingly, evidence sufficient to withstand a motion for directed verdict on the federal causes of action provides at least as sufficient a basis for also requiring jury determination of the state law claim. Moreover, there is no requirement in the Unfair Trade Practices Act of a contract, combination or conspiracy as there is under § 1 of the Sherman Act. It is therefore entirely possible that

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[8]Indeed, read this way the Act truly would be redundant and, in some cases, possibly in conflict with federal law. Instead, "the statutory mandate to follow federal interpretations of the FTC Act indicates that state courts are now free to find methods, acts or practices not heretofore specifically declared unlawful by the FTC or the federal courts prohibited by the [UTPA] . . ." Day, The South Carolina Unfair Trade Practices Act, *supra* note 21, 33 S.C.L.Rev. at 482, quoting Murphy v. McNamara, 36 Conn. Supp. 183, 187 n.4, 416 A.2d 170, 174 n.4 (1979) (interpreting identical language in Connecticut's Unfair Trade Practices Act).

the jury could find Bostick to have been terminated in furtherance of unfair or anticompetitive purposes—*e.g.*, to harm its business because of its role as a growing wholesale competitor of Michelin's—without rendering a verdict duplicative of the federal claims. It is, of course, proper that the jury be instructed not to award duplicative damages for violations of both the state and federal statutes based upon precisely the same conduct, and the defendant will be free to ask for an instruction to this effect. But dismissal of the Unfair Trade Practices Act claim as a matter of law was incorrect here.

IV.

Bostick contends that the district court committed reversible error in excluding from evidence a memorandum written by Michelin's district manager on May 7, 1977, offered as plaintiff's Exhibit 42. The memorandum concerned plaintiff's sales activities and was prepared by defendant's district manager to set forth his comments and recommendations for the use of his corporate superior. The district court originally found admissible all but two paragraphs of the memorandum,* and ruled that the exhibit would be admitted if plaintiff agreed to delete those two paragraphs. However, when defendant continued to press its objection, the district court ruled the entire document inadmissible on a variety of grounds.

Even if admissible, we do not think that the ruling excluding this evidence would be reversible error because the statements it contains are largely cumulative of other evidence regarding the district manager's reports and recommendations to defendant's management. We would thus not consider the point were it not that we order a retrial at which it is not unlikely that the exhibit will be offered again.

In our view the memorandum is admissible as an admission, under rule 801(d)(2)(C) and (D), Fed. Rules of Evidence, whether or not unfavorable to defendant, provided that it is shown either

*The two paragraphs ruled inadmissible allegedly related solely to the sale of passenger tires and were ruled irrelevant because the alleged antitrust violations all related to the sale of truck tires.

(a) that the district manager was authorized to make a statement concerning the subject, or (b) that the memorandum was made by defendant's agent concerning a subject within the scope of his agency during the existence of the agency relationship. If either of those conditions is met, the district court, on retrial, should admit the memorandum as an exhibit. The statement's status as a nonhearsay admission does not turn, as the district court believed, on proof that a company superior actually relied on the memorandum. Of course, the admissibility of the memorandum is subject to the limitations of Fed. R. Evid. 402 and 403, that it be relevant and that its probative value not be substantially outweighed by the danger of unfair prejudice, confusion of the issues, etc. Thus the district court may properly require the memorandum to be redacted either because portions are irrelevant or would result in the evils protected against by Rule 403, or both. In that event, however, the elimination of the improper material should be made by the district court without requiring the plaintiff's agreement and the balance should be admitted.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 81-1985

Bostick Oil Company, Inc., *Appellant*,

versus

Michelin Tire Corporation,
Commercial Division, *Appellee*.

ORDER

The appellee's supplemental petition for rehearing and suggestion for rehearing en banc has been submitted to the court. Upon the request for a poll of the court on the suggestion for rehearing *en banc*, all of the judges voted against rehearing *en banc*, except Judge Russell, Judge Widener, Judge Hall and Judge Chapman, who voted in favor of rehearing *en banc*.

The panel considered the petition for rehearing as supplemented and is of the opinion that it should be denied.

It is ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing en banc are denied.

Entered at the direction of Judge Winter for a panel consisting of Judge Winter, Judge Phillips and Judge Butzner.

For the Court,
s/ William K. Slate, II
CLERK

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

BOSTICK OIL COMPANY, INC.,

Plaintiff,

vs.

MICHELIN TIRE CORPORATION,
Commercial Division,

Defendant.

CA. NO. 78-837-5

ORDER ON DEFENDANT'S
MOTION FOR DIRECTED VERDICT

In this multiple-claim action, Bostick Oil Company, Inc. (Bostick) seeks judgment against Michelin Tire Corporation, Commercial Division (Michelin) for alleged violations of the Sherman Act, Sections 1 and 2 (15 U.S.C. §§ 1 and 2)[1], the South

[1] 15 U.S.C. § 1, United States Code Annotated provides

§ 1. TRUSTS, ETC., IN RESTRAINT OF TRADE ILLEGAL; PENALTY

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine or not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by other said punishments, in the discretion of the court.

15 U.S.C. § 2, United States Code Annotated provides

§ 2. MONOPOLIZING TRADE A FELONY; PENALTY

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by other said punishments, in the discretion of the court.

Carolina Unfair Trade Practices Act (Code of Laws of South Carolina Section 39-5-10 *et seq.*, (1976)), fraud, and breach of contract.[2]

Plaintiff filed its complaint in May, 1978, two days before the noticed expiration of its yearly Dealer Sales Agreement with Michelin and obtained a temporary restraining order (TRO) in this Court requiring Michelin to continue doing business with Bostick. Michelin immediately moved to modify the TRO because at that time Bostick was indebted to Michelin in the approximate amount of $530,000, and the bond securing the TRO was only $1,000. In response to the Court's Order conditioning continuance of the TRO on the bond being increased to $100,000, and ordering payment of Bostick's account with Michelin as it came due, Bostick declined to file the increased bond and advised the Court that it would voluntarily abandon the TRO. Shortly thereafter, Bostick ceased doing business with Michelin, but requested and obtained permission to return a large volume of truck and passenger tires to facilitate the payment on its account with Michelin. In due course the account balance was paid.

Protracted discovery began in 1978 and ran the ordinary course, this Court finally cutting off further pursuit approximately two weeks before trial. During the intervening period there was the usual plethora of interrogatories, production of documents, and depositions which have become the rule, rather than the exception, in antitrust litigation.

Since a major task in any antitrust litigation is sheperding the real and imaginary claims and defenses into the fold so that a disposition by trial may begin, the Court endeavored to closely monitor the progress of the case and conducted a number of hearings, hoping to aid the parties in bringing the matter to trial on its essential claims and defenses. Prior to trial, Michelin sought and obtained bifurcation of liability and damages but failed in its efforts to have the Court strike Bostick's demand for a jury trial.

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[2]The main thrust of plaintiff's suit was antitrust

During the course of the trial, which began on July 27, 1981, plaintiff called twelve of the twenty-three possible witnesses, and read portions of the discovery depositions of fourteen others. Plaintiff introduced into evidence certain tape recordings of conversations with Michelin sales representatives gathered at Estill by Joe Bostick[1] without defendant's knowledge or prior authorization. At the close of plaintiff's case, defendant moved for a Directed Verdict pursuant to Rule 50 of the Federal Rules of Civil Procedure. The Court thereafter required written memoranda pertaining to the motion from counsel, and oral arguments were heard on August 5, 1981. For reasons which will be set forth hereinafter, defendant's motion was/is granted as to the first, second, third and fourth causes of action, denied as to the fifth cause of action (alleging breach of contract). Prior to the filing of this Order plaintiff and defendant consented to the dismissal with prejudice of the fifth cause of action and the counterclaim, respectively. The Court therefore does not address these causes of action.

It is axiomatic that in considering a motion for directed verdict pursuant to Rule 50(a) of the Federal Rules of Civil Procedure, the Court must consider all the evidence presented by the non-moving party in the light most favorable to that party. *E. J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 478 F.Supp. 243 (E.D. Pa. 1979), *aff'd* 637 F.2d 105, *cert. denied* ____ U.S. ____ (April 20, 1981); *Ard v. Seaboard Coastline Railway Company*, 487 F.2d 456 (4th Cir. 1973). The party opposing the motion is entitled to the benefit of every inference which reasonably may be drawn in his favor. *Collins v. Craven*, 52 F.R.D. 146 (4th Cir. 1971); *Westinghouse Electric Corp. v. CX Processing Laboratories, Inc.*, 523 F.2d 668 (9th Cir. 1975). However, "(i)f an antitrust plaintiff . . . does not present enough evidence within his case-in-chief to support a reasonable finding in his favor, a district court has a duty to direct a verdict in favor of the opposing party." *Chisholm Brothers Farm Equipment Co. v. International Harvester Co.*, 498 F.2d 1137 at 1139 (9th Cir. 1974), *cert. denied* 419 U.S. 1023. *Roesch, Inc. v. Star Cooler Corp.*, ____

[1] Joe Bostick was President of Bostick Oil Company at the time

F.Supp. ——, 1981-1 Tr. Cas. ¶ 64119 (E.D. Mo. 1981). A mere scintilla of evidence will not avoid a directed verdict. The nonmoving party must introduce such relevant evidence as a reasonable mind would accept as adequate to support a conclusion in his favor. *Westinghouse Electric Corp. v. CX Processing Laboratories, Inc., supra; California Computer Products v. IBM Corp.* 613 F.2d 727 (9th Cir. 1979); *Collins v. Craven, supra.*

Considered in the light most favorable to the plaintiff, and affording the plaintiff the benefit of every reasonable inference, the evidence presented by Bostick is insufficient as a matter of law to withstand the defendant's motion for a directed verdict on the first four causes of action, alleging antitrust violations, unfair trade practices, and fraud. In reaching this conclusion, the Court has not weighed the credibility of witnesses. *Old Dominion Stevedoring Corp. v. Polskie Linie Oceaniczne*, 386 F.2d 193 (4th Cir. 1967).[*] Rather, this Court has considered all of the evidence presented and has concluded that it offers the jury no more than conjecture and speculation on which to base a decision, and the responsibility is thereby shifted to the presiding judge. A directed verdict for defendant on the first four causes of action therefore is compelled under the standards enunciated above.

FACTUAL BACKGROUND

Viewed in the light most favorable to plaintiff, and affording it the benefit of every reasonable inference, the record supports the facts hereinafter detailed.

Bostick Oil Company was a family-owned fuel oil business until about 1967 when it began selling tires. Thereafter, the concentration of its business shifted from oil to tires and accessories, through a progression of representing one or two tire companies to a point of selling a large variety of tires, including brands manufactured or distributed by Falls made by Cooper, Goodrich,

[*] "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the Court should determine the proceeding by nonsuit, directed verdict or otherwise in accordance with the applicable practice, without submission to the jury, or by judgment notwithstanding the verdict [197]

Uniroyal, Goodyear, Firestone, Bridgestone, General, Hood, Jetson, and various other major or independent manufacturers. Bostick's primary method of sales was by telephone, route truck sales, or traveling sales people. Defendant Michelin Tire Corporation, Commercial Division, is the corporate sales arm of Michelin Tire Corporation, which also has a manufacturing division. In 1974, Bostick and Michelin entered into their first of successive one-year Dealer Sales Agreements (DSA), and each year from 1974 through 1977, a new agreement was executed as the previous one expired. Each of the four agreements clearly provided for expiration at the end of the one-year term, and each was for a variety of Michelin tires and tubes (passenger, light truck, truck and off-the-road).

Bostick, historically, had concentrated its sales efforts in passenger tires. In mid-1975, however, Bostick entered into a sales arrangement with an aggressive sales person, Betty Wilkinson, who had gained considerable experience selling truck tires, Michelin and other brands, as a sales person for Crane Tire Company in Danville, Virginia. She commenced selling large numbers of Michelin truck tires through Bostick, and enjoyed considerable success because she, and Bostick, were willing to sell the tires at or near the dealer net billing price, which is the base price a Michelin dealer must pay for the tires, exclusive of applicable discounts. At that time, dealer net billing on truck tires was 22% off the suggested retail price.

A significant issue in this action was a dealer's obligation to provide service. Paragraph 2(a) of each of the Dealer Sales Agreements signed by Bostick and Michelin provided in part:

> Dealer shall vigorously and aggressively promote the retail sale of Michelin Products and shall render prompt, workmanlike and courteous service with respect to Michelin Products including all services to which a purchaser of a Michelin Product from any authorized Michelin source may be entitled.[3]

[3]Plaintiff's witnesses testified this was in other contracts with dealers, and dealers called to testify told of the outlay in personnel and equipment needed to meet this obligation of the contract.

In 1974, when Bostick first became a Michelin dealer, Bostick promised Frank Rendine, a Michelin field representative, that truck tire service capabilities would be developed at the Estill location. In early 1976, however, it came to Michelin's attention that Bostick was not servicing the truck tire accounts it was selling. Michelin representatives Ward Johnson and Jay Radford met with President Joe Bostick on April 16, 1976 for the specific purpose of explaining the service requirements of the Dealer Sales Agreement. When Joe Bostick told Radford and Johnson that the "had no intention" of servicing the truck tires he sold, these Michelin representatives advised Bostick that the agreement to be executed in May 1976 would not include truck tires, because Bostick was not servicing his truck tire customers. Joe Bostick adjourned the meeting for a short period, then returned with two attorneys who represented Bostick Oil Company. As plaintiff's witnesses at trial, these attorneys confirmed Radford's testimony. When Joe Bostick was told that Bostick Oil would not be renewed as a truck tire dealer in 1976 unless he promised to service the truck tires he sold, he promised compliance. Based upon his assurance that service capabilities would be developed and implemented, the DSA was renewed for both passenger and truck tires for 1976-77.

In the summer of 1977, Bostick sales people began selling heavily through the Michelin National Accounts Program. This program, designed to meet the needs of large national fleets, is a method whereby Michelin dealers may deliver tires to a large user, following which the user is billed directly by Michelin and the dealer is paid a commission for handling the transaction. Michelin also credits the dealer with the National Account price of tires previously purchased from Michelin and subsequently delivered to the National Account. In 1977, Michelin's price to the National Account was 20% off suggested retail price, and the commission to dealers was 12% of the transaction price. The Program is entirely voluntary, and any dealer who elects not to participate is nevertheless free to sell directly to a customer who is a designated national account. Similarly, national account customers may decide voluntarily whether to buy through or apart

from the National Account Program. The choice is one in which Michelin takes no part. The dealer and the purchaser decide what type of sale will take place, leaving the price to the dealer to negotiate with the customer as he wishes.

Through the National Account Program, Bostick was able to increase the number of its customers, largely because the Program provided Bostick with an additional 12% commission which could be rebated to the customer in whole or in part to increase sales. If Bostick followed its usual dealer net billing practice, i.e., selling at 22% off suggested retail, it could offer a National Account a 2% advantage by direct sale over the existing 20% discount the user received for National Account participation. Therefore with an additional 12% National Account commission paid Bostick by Michelin, Bostick could and did, further enhance its competitive position by additional concessions of this 12% commission to National Account users.[6] For example, Bostick rebated 8%, 12% and as much as 15% in order to obtain the business from trucking companies. Whereas Bostick might through a direct sale give a customer a 22% discount plus another 4% off the discounted price, depending on the number of tires sold, through the National Accounts Program the customer would receive a 20% discount from Michelin plus a rebate (discount) of up to 8% from Bostick,[7] thus realizing a larger discount through the latter sales program. In sum, a dealer, here Bostick, had larger discounts (points) available to it for price competition by participating in the Michelin National Accounts Program. Obviously, it could keep these gross profits to operate its business, or give them away to try to obtain more business. Bostick chose to give them away.

At the beginning of 1978, Michelin representatives urged Bostick to participate in a promotional incentive bonus (PIB)

[6] In the normal course of its business with Michelin a dealer, including Bostick, after purchasing at 22% below suggested retail, could earn a Quantity Shipping Allowance of up to 9%, a Year End Volume Bonus of up to 5%, a cash discount of 2% and a freight allowance of 2%. These discounts, and Bostick's 12% National Account commission, could also be used by Bostick or any other dealer for voluntary price concessions in the market.

[7] Joe Bostick testified at trial he would give 8% rebate to certain large accounts.

program, in which Bostick could qualify for an additional bonus at the end of 1978 by (1) meeting an advertising quota for the first half and the second half of the year and (2) purchasing a quantity of Michelin tires in excess of the preceding year's sales, e.g., an increase of 10% would yield a bonus of 1%, a 20% increase resulted in a 2% bonus, etc., up to a maximum 3% bonus. Bostick participated in the program until it was not renewed in May of 1978 and had qualified up to that time for at least the 1% bonus, having purchased a sufficient quantity of tires and having met its first half advertising quota. Bostick thereafter voluntarily returned tires to reduce its debt due Michelin. When the returned tires were deducted, Bostick's volume of purchases fell below the amount necessary to qualify for the PIB program. Plaintiff contends Michelin knew of the possibility that it would not renew Bostick in 1978, but the testimony clearly indicates the non-renewal decision was not made until April of 1978. Plaintiff failed to show either a causal connection between the non-renewal and Bostick's participation in the PIB program or even offer an explanation why Bostick gave up its existing qualification for at least the 1% bonus. Bostick argues that its non-renewal made qualification under the program impossible, because it would be unable to meet the second six month advertising quota. Radford, however, testified that if Bostick had not returned the tires, the one percent bonus would have been paid and this was not denied. In any event, Bostick's voluntary return of tires to reduce its indebtedness to Michelin mooted plaintiff's argument.

In April of 1978, Michelin's representatives advised Bostick its Dealer Sales Agreement in 1978 would not include truck tires. Bostick at that time declined to sign the Dealer Sales Agreement for passenger and light truck tires. After conferring with attorneys over a period of a month, during which time Joe Bostick made some of the recordings previously mentioned, Bostick instituted this action and simultaneously executed and forwarded to Michelin a Dealer Sales Agreement relating only to passenger and light truck tires. Michelin refused to sign an agreement on passenger tires because of the institution of this action, and the litigation proceeded. The claim involving the refusal of Michelin

to contract with Bostick on passenger and light truck tires was the subject of the fifth cause of action which the parties acknowledge is to be dismissed by this Order, together with Defendant's counterclaim, with prejudice.

THE MONOPOLY CLAIM

Liability under Section 2 of the Sherman Act (15 U.S.C. § 2)* is founded on a showing of (1) specific intent to control prices or destroy competition, i.e., specific intent to monopolize, (2) anti-competitive or predatory conduct, and (3) a dangerous probability of success, including proof of the relevant market and assessment of the actor's power in that market. Finally, the plaintiff must prove both the fact and amount of damage.† In order to withstand the defendant's Motion for Directed Verdict, the plaintiff must offer sufficient evidence to allow a jury to find facts or draw inferences sufficient to establish each of these elements. Bostick has not elicited any such evidence.

The specific intent required by the statute is an intent to control prices or destroy competition; it is, in fact, an intent to monopolize the market. *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919 (9th Cir. 1980), *cert. den.* ____ U.S. ____, 101 S.Ct. 1369. In some cases, the requisite specific intent can be inferred from egregiously anti-competitive or predatory conduct, and the requisite conduct in turn can be inferred from a showing of specific intent. *Gough v. Rossmoor Corp.*, 585 F.2d 381 (9th Cir. 1978), *cert. den.* 440 U.S. 936 . Such is not the case here.

Here, there is clearly insufficient direct or circumstantial evidence of the requisite intent, and proof of predatory or anti-competitive conduct sufficient to establish or support an inference of intent is similarly lacking. The National Account Program, on which the plaintiff bases its argument as to intent, was entirely voluntary and did not prohibit the dealer from

*See Note *supra*.

†In view of this Court's Order of May 7, 1981 granting bifurcation, the issue of act and amount of damage are mentioned only and are not discussed, but the Court indicated that if plaintiff proved its case of liability, the fact of damage would be pursued.

selling to any customer he desired. Moreover, the dealer could sell a designated national account customer directly or under the National Account Program. The choice was the dealer's and the customer's. The National Account Program, finally, did not fix the price of tires to the customer, since the dealer who elected to use the National Account Program might choose (as Bostick did) to rebate part or all of his commission and credits[10] to the customer, and the dealer selling a national account customer outside of the program could sell individually at his own price. This is in contract with the situation described in *Greene v. General Foods Corp.*, 517 F.2d 635 (5th Cir. 1975), *cert. denied* 420 U.S. 929. The Michelin National Account Program is not anti-competitive or predatory conduct. *Ohio-Sealy Mattress Manufacturing Co. v. Sealy*, 585 F.2d 821 (7th Cir. 1978), *cert. denied* 440 U.S. 930. The program did not deprive any dealer, including Bostick, of the ability to set his own prices. To infer specific intent from such evidence would be to place inference on inference on inference and would be contrary to the facts established by Bostick as part of its own case.

Proof of a dangerous probability of success requires a showing of the relevant market and significant power on the Defendant's part in that market. *United States v. E.I. DuPont de Nemours & Co. (Cellophane)*, 351 U.S. 377 (1956), *Unibrand Tire & Product Co., Inc. v. Armstrong Rubber Co.*, 429 F.Supp. 470 (W.D. N.Y. 1977); *Mullis v. ARCO Petroleum Corp.*, 502 F.2d 290 (7th Cir. 1974); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547 (1st Cir. 1974), *cert. denied* 421 U.S. 1004. The plaintiff has conceded that the geographical market encompasses the entire United States. There is an absence of proof, however, as to the relevant product market.

Bostick attempted to argue that Michelin radial tires constitute a product market in and of themselves. Not only has Bostick failed to introduce evidence sufficient for submission of this

[10]The amount credited to a dealer such as Bostick on the National Account sale was often greater than the price at which it purchased the tire. If a price increase were instituted between the time Bostick purchased and sold a tire to a National Account, for instance, Bostick would be credited at the new, higher price.

issue to the jury but the Court has serious doubts that, under normal circumstances, a single brand can constitute a relevant product market. Almost every court considering the issue has rejected a single brand product market. *H & B Equipment Co. v. International Harvester Co.*, 577 F.2d 239 (5th Cir. 1978); *Carlo C. Gelardi Corp. v. Miller Brewing Co.*, 421 F. Supp. 237 (D. N.J. 1976); *Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc.*, 637 F.2d 1376 (9th Cir. 1981). Whether or not a single brand product market is possible as a matter of law, however, the evidence presented by Bostick simply cannot support the contention that Michelin tires are so unique or superior that they are in a market by themselves. Plaintiff's expert, George Edwards, testified that Michelin tires, like other manufacturers' radials, are often used on the same vehicle with less expensive bias ply tires.

As the Supreme Court stated in the *Cellophane* decision, the relevant product market is defined in terms of functional interchangeability, cross-elasticity of demand, and cross-elasticity of supply. According to the evidence and testimony, Michelin sells only radial tires. The evidence Bostick elected to introduce, however, shows that trucking companies use many brands, not simply Michelin, and that cost factors influence the decision to use one brand of tire versus another. Moreover, Bostick's expert gave his opinion that at least 50% of the truck tires now in use are bias ply tires. Neither the "preference" of truck drivers for Michelin tires, nor the fact that Michelin tires are generally higher priced than other brands can support a finding of a relevant product market consisting of Michelin tires alone. *Acme Precision Products, Inc. v. American Alloys Corp.*, 484 F.2d 1237 (8th Cir. 1973); *Twin City Sportserv, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264 (9th Cir. 1974). No juror could conclude on the basis of Bostick's evidence that Michelin is immune to competition. Quite the contrary; Henry Hay, plaintiff's witness, stated that competition is even stronger in the marketplace now than it was in 1978. Plaintiff has produced no evidence to support the delineation of any other product market.

Bostick's failure to introduce sufficient evidence on which a jury could make a reasonable determination of the relevant prod-

uct market is fatal to its cause. *Mullis v. ARCO Petroleum Corp., supra; Gough v. Rossmoor Corp., supra; ILC Peripherals Leasing Corp. v. IBM Corp.*, 485 F.Supp. 423 (N.D. Cal. 1978), *aff'd* 636 F.2d 1188; *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256 (5th Cir. 1978), *cert. denied* 440 U.S. 939; *Acme Precision Products, Inc. v. American Alloys Corp., supra; Bendix Corp. v. Balax, Inc.*, 471 F.2d 149 (7th Cir. 1972), *cert. denied* 414 U.S. 819. Had there been sufficient evidence on which a jury could rationally determine the relevant product market, Bostick offered no evidence as to Michelin's market share or power in any market. Absent such a showing, the jury could not determine that there existed a dangerous probability of successful monopolization.

Plaintiff having failed to introduce evidence sufficient to permit a jury to find the requisite specific intent, relevant market and market power, defendant's Motion for Directed Verdict on the first cause of action must be granted.

THE CONSPIRACY TO RESTRAIN TRADE

In order to prove a Sherman Act Section 1 conspiracy or combination in restraint of trade, plaintiff must establish: (1) the existence of a conspiracy or combination, (2) a restraint on trade, (3) conduct amounting to a *per se* illegality *or* an unreasonable restraint of trade, and (4) fact and amount of damage.[1] In order to determine whether or not a restraint is reasonable, plaintiff must address such factors as the relevant market involved (both geographical and product), defendant's market power in that market, the presence or absence of competition in the market, the effect of restraint on the market, and the goal and breadth of the restraint. Here, Bostick's proof does not afford a sufficient evidentiary basis to find the presence of any of the necessary elements.

The evidence of conspiracy is non-existent. Bostick argues

[1] In view of this Court's Order of May 7, 1981 bifurcating the major issues of liability from those of damage, the issue of fact and amount of damage are mentioned only and are not discussed.

that "complaints" about Bostick received by Michelin personnel permit an inference that Michelin entered into a conspiracy with the complaining dealers and that Bostick's nonrenewal was the fruit of that conspiracy. The record simply cannot support that contention.[12]

In its recent monumental opinion granting the defendants summary judgment in *Japanese Electronic Products Litigation* (*Zenith Radio Corp. v. Matsushita Electric Industrial Co.*), ____ F.Supp. ____ 484 CCH Tr. RR (Extra Ed.) April 9, 1981 (E.D. Pa. 1981), at 42, the Court emphasized that the statute requires "a conscious commitment to a common scheme designed to achieve an unlawful objective." The Court of Appeals for the Sixth Circuit made a similar statement in *Elder-Beerman Stores Corp. v. Federated Department Stores, Inc.*, 459 F.2d 138 (6th Cir. 1972) at page 140: "In order to establish the existence of a conspiracy it is absolutely essential to prove that there was an *agreement* between the named conspirators (no conspirators were named in the complaint) . . . the conspiracy is complete on the forming of the . . . *agreement* and the performance of at least one overt act in futherance thereof." (Citations omitted; emphasis in original.)

Mere complaints do not a conspiracy make.[13] One of the depositions read in the record as part of the plaintiff's case (John F. Haugh, pages 47-48) described the complaints in the following manner:

> ". . . It's fairly routine in the business of calling on customers that one customer will complain about others . . .

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[12]A review of the testimony shows that James E. McCrary (user) Transportation and Sales Manager for Dairymen, Inc. at Stone Mountain, Georgia, was recommended to Bostick by Frank Rendine, Sales Manager of defendant. John Tupper complained about Bostick's methods but no action was pursued or taken. All witnesses called by plaintiff under Rule 611 testified the complaints were usual and no action was taken on them.

[13]The cases are legion so holding. *Carr Electonics Corp. v. Sony Corp. of America*, 472 F.Supp. 9 (N.D. Cal. 1979); *Oreck Corp. v. Whirlpool Corp.*, 639 F.2d 75 (2d Cir. 1980); *A.G. Rogers v. Merck & Co.*, 498 F.Supp. 5 (E.D. Tenn. 1980); *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036 (2d Cir. 1976), *cert. denied* 429 U.S. 885.

> . . . So, it pretty much becomes like water off a duck's back after a while. You might just listen to it, sympathize, and move on to your business."

Common sense tells us that complaints from buyers and sellers about each other and about their competitors are to be expected in the marketplace. *Carr Electronics Corporation v. Sony Corporation of America*, 472 F.Supp. 9 (N.D. Cal. 1979); *Oreck Corp. v. Whirlpool Corp.*, 639 F.2d 75 (2d Cir. 1980); *A. G. Rogers Co. v. Merck & Co., Inc.*, 498 F.Supp. 3 (E.D. Tenn. 1980). They are, in fact, "rational market behavior." *E. G. Sweeney & Sons, Inc. v. Texaco, Inc.*, *supra*. The unsolicited behavior of other dealers therefore cannot serve as the basis for Section 1 liability. Mere complaints cannot support an inference of conspiracy. It is significant that the plaintiff has attempted to confirm a single non-renewal into an antitrust suit. Plaintiff apparently recognizes its own right not to renew the contract, but does not recognize defendant's right to do the same.

Moreover, Bostick has produced no evidence which would justify a jury's conclusion that whatever complaints occurred prompted Michelin's decision not to renew Bostick as a Michelin dealer. Indeed, all of the evidence is to the contrary. Mr. McMillan, plaintiff's witness, stated, "There was no response" to his complaints about Bostick. As conceded by plaintiff's counsel, this is in contrast to the finding of *D. B. Rice Tire Company v. Michelin Tire Corp.*, 483 F.Supp. 750 (D. Md. 1980), *aff'd.* 638 F.2d 15. The essential causal connection between complaints and the action taken by defendant, which was present in *Rice* and in *Girardi v. Gates Rubber Co.*, 325 F.2d 196 (9th Cir. 1963), is absent here. The evidence elicited by Bostick can lead to no other conclusion but that Michelin's decision not to renew Bostick was based on Bostick's failure to develop the service capabilities it promised in 1974 and specifically agreed to again in 1976. Certainly, none of the evidence supports the conclusion that Bostick's wholesaling activities or price cutting had any causal connection whatsoever with Michelin's failure to renew the Dealer Sales

Agreement with Bostick. On the state of this record, no conspiracy or combination can be found.[14]

Similarly, the record will not support a finding of any *per se* illegal restraint of trade. There is a total failure of proof of any causal connection between the complaints received by Michelin and the decision not to renew the business relationship between Michelin and Bostick, and nothing in the record supports the claim that price was a motivating factor in the determination not to renew Bostick made by Michelin's decision makers.

Nor can the evidence as to the operation of Michelin's National Accounts Program fill this fatal void, for two reasons. First, the Program was entirely voluntary. Second, it did not act as a price control device. As mentioned earlier, the evidence, viewed in the light most favorable to Bostick, shows that Michelin's National Account Program was designed for the benefit of the large fleet users. Michelin billed the National Account directly, in 1977 the amount being 20% off of the suggested retail price. The selling dealer, in this case Bostick, received (in 1977) a 12% commission for completing the sale. But, Michelin's invoice to the user did not represent, strictly speaking, the "price" of the tire to that user. Joe Bostick testified that he rebated at least 6% to 8% to customers under the National Account Program. "In some instances, I gave away the full 12%. Michelin did not say yes or no. I could save a lot of money by the National Account." This leads to the inevitable conclusion that Michelin did not intend to, could not and did not control the prices of tires sold to National Account customers under the National Account Program. Despite the fact that the National Account was billed directly by Michelin, the price was affected by the rebate given by the dealer to that customer. A dealer could elect to sell under the National Account Program or not to sell under the program. Furthermore, a National Accounts Directory was available to every Michelin dealer, and every dealer was free to compete for any customer in the National Accounts Program to accomplish tire sales, either

[14] Of significance here is the attempt to make an antitrust suit out of defendant's failure renew. Joe Bostick testified on cross-examination: "Christensen (defendent's agent) didn't say he would renew. I had the right to renew. I had the right not to sign the contract."

within or outside of the National Accounts Program. Thus, the Program did not prohibit *intrabrand* competition between dealers. The freedom to select customers remained despite their designation as national accounts. The record cannot support a declaration that the National Accounts Program operated either as a price maintenance device or as a customer restriction.[5]

Plaintiff also argued that the service requirement in the Dealer Sales Agreement was a *per se* illegal restraint of trade. In support of this contention, Bostick introduced the testimony of several tire dealers who maintained full service capabilities. Their testimony, however, does not support the claim that the service requirement was a method of restraining trade in any way. Rather, the entire testimony was to the effect that Michelin, with its concern for safety and the consumer's tire cost per mile of operation, had the concept of a complete service effort from the time the tire was sold until the casing was discarded. Nothing in the record suggests that any other concern was addressed through Michelin's full service requirement. The critical importance of providing service is uncontradicted. Messrs. Hay, Tupper and Dunlap, as well as others among plaintiff's witnesses, explained the necessity of servicing truck tires to ensure their performance.

The Court has concluded that evidence of a *per se* illegality is lacking. In so doing, it is evident that Bostick has failed to offer evidence which could rationally lead to the conclusion that any customer or territorial restraints existed. Neither the National Accounts Program nor the service requirement limited Bostick to certain customers or territories. Simply stated, nothing in the record can justify the jury finding the existence of a restraint on trade. *Golden Gate Acceptance Corp. v. General Motors Corp.*, 597 F.2d 676 (9th Cir. 1979). Even if such a restraint were present, however, the lack of evidence as to any motivation for the restraint other than service would compel a finding of reasonableness. *Continental TV v. GTE Sylvania*, 433 U.S. 36 (1977),

[5]There is absolutely no evidence of any resultant restraint on interbrand competition. If anything, the evidence suggests that the National Accounts Program encouraged interbrand competition by making tires available for sale to the fleet user at a lower price

D. B. Rice Tire Co. v. Michelin Tire Corp., supra; World-Wide Volkswagen v. Autobahm Motors Co., ____ F. Supp. ____, 1980-81 Tr. Cas. ¶ 63601 (S.D. N.Y. 1980).

All of the evidence elicited by Bostick on this cause leads ineluctably to the conclusion that Michelin unilaterally and reasonably decided not to continue doing business with Bostick because of Bostick's intentional and continuing breach of Paragraph 2(a) of the Dealer Sales Agreement. On the basis of this record, the jury could not conclude nor could the Court allow to stand any finding, that there existed an unreasonable restraint of trade in the relevant market.[18]

SOUTH CAROLINA'S UNFAIR TRADE PRACTICES ACT

In the third cause of action, plaintiff claims Michelin violated the South Carolina Unfair Trade Practices Act, § 39-5-20(a), Code of Laws of South Carolina, 1976, which provides:

> Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

Subsection (b) declares the Legislature's intent to have the state act interpreted in conformity with § 5(a) of the Federal Trade Commission Act (15 U.S.C. 45(a) (1)). Thus, an act or practice which is lawful under the federal statute is lawful under the state act. To prevail, Bostick must not only prove the existence of a pernicious practice, but also that the act or practice either restrained trade or was an incipient menace to it. *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1948); *Federal Trade Commission v. Markin*, 391 F.Supp. 865 (D.C. Mich. 1974) *aff'd* 532 F.2d 541. Plaintiff has failed to offer evidence from which a jury could rationally find any of the required elements.

Bostick alleges, but has failed to elicit testimony or evidence proving or even tending to prove, (1) the non-renewal was con-

[18]Plaintiff's second cause of action also must fall for failure to offer sufficient evidence to support the delineation of a relevant product market. See first cause of action, *supra*. This is an independent ground on which the Court must rule in favor of the defendant on this cause.

trary to equity and good conscience, (2) Michelin fraudulently induced Bostick to enter into an advertising program and the National Account Program, (3) Michelin took affirmative action to secure compliance with its prices, and (4) Michelin restricted the territory or persons to whom the product could be transferred. Not only did Bostick fail to offer proof of the last two assertions, but testimony offered as part of its case affirmatively established to the contrary: (1) Michelin did not apply territorial restrictions and (2) Michelin did not take any action with regard to prices charged by dealers. As to Bostick's assertions that it was fraudulently induced to participate in the advertising program and the National Account Program, not only is there a total lack of supporting evidence, but the record reveals that Bostick at all times voluntarily and actively participated in the programs, the features of which had been made clear to Bostick in written and oral explanations.[7] Bostick's decision to sell national accounts (listed in published National Account directories made available to Michelin dealers) under the National Account Program or by direct sales was an independent choice. Bostick's attempts to have purchasers designated as National Accounts, assuming the customers were not already listed and otherwise qualified, was entirely voluntary. As previously recognized, National Account Programs have been upheld in other areas. *Ohio-Sealy Mattress Manufacturing Company v. Sealy, Inc., supra.*

Lastly, did the non-renewal itself amount to an unfair trade practice? No, because a unilateral refusal to deal cannot support this cause of action. As the Court held in *Naifeh v. Ronson Art Metal Works*, 218 F.2d 202, at 206 (10th Cir. 1954) in construing 15 U.S.C.A. § 13(a):

> . . . as a private trader in interstate commerce, Ronson not only could select its own customers but also could refuse to sell its merchandise to anyone and by so doing would in no way violate the antitrust laws. It is settled

[7] The advertising program was described in the program brochure marked plaintiff's Exhibit 62. The details of the National Account Program are set forth in Michelin's brochure marked plaintiff's Exhibit 118. The National Account Program Directory was marked plaintiff's Exhibit 132.

> law that a seller may either refuse to negotiate or may cease doing business with a customer without running afoul of the Act. . . .

Bostick has not elicited any evidence whatsoever supporting its claim that Michelin refused to deal with Bostick in bad faith or with anticompetitive motives. The only conclusion which can be drawn from the evidence presented by plaintiff is that Michelin unilaterally elected not to renew Bostick as a dealer for legitimate business reasons, i.e., Bostick's continuing breach of Paragraph 2(a) of the Dealer Sales Agreement. The federal act does not prohibit such independent business judgments.

Although acts and practices which do not amount to full-fledged Sherman Act violations may, nevertheless, constitute unfair trade practices, Bostick has failed to offer or elicit any evidence tending to show conduct even approaching that proscribed by the Act. As previously pointed out, there was also a lack of proof that any alleged act or practice either adversely affected free competition or was an incipient menace to it. This is equally determinative in concluding the directed verdict must be granted as to the plaintiff's third cause of action. *See Red Diamond Supply, Inc. v. Liquid Carbonic Corporation*, 637 F.2d 1001, at 1008 (5th Cir. 1981).

An alternative basis for denying consideration of this claim is jurisdictional, i.e., under South Carolina Code § 39-5-40(d), this Court is without jurisdiction to apply the South Carolina Unfair Trade Practices Act. Bostick cannot maintain a claim under the Act because the Act does not apply to the facts of this case. The statute provides for an exemption from the Act's coverage for "any challenged practices that are subject to, and comply with, statutes administered by the Federal Trade Commission and the rules, regulations and decisions interpreting the statutes." This exemption incorporates the legislative intent to limit the Act to conduct which is solely or primarily intrastate, in clear recognition of the duty upon the State of South Carolina to avoid interference with interstate commerce, and in further

recognition of the supremacy clause of the Constitution (Article VI, Clause 2).[8]

Plaintiff acknowledged that its activities were in interstate commerce and, indeed, its counsel conceded this in oral argument. This being so, the Federal Trade Commission statutes and rulings would apply, to the exclusion of the state act, and the decisions interpreting these laws recognize the right of a manufacturer to select its customers or to refuse to deal with a specific customer. *Johnson v. J. H. Yost Lumber Co.*, 117 F.2d 53, at 61 (8th Cir. 1941); *Naifeh v. Ronson Art Metal Works, Inc., supra; FTC v. Raymond Bros.-Clark Co.*, 263 U.S. 565 (1924).

This Court has carefully considered all the evidence presented by Bostick and finds that the evidence clearly establishes that the acts and practices complained of here are subject to and comply with the FTC Act (15 U.S.C. § 45(a)(1)). This Court is without jurisdiction to apply the state act and finds the defendant has satisfactorily established the exemption prescribed by § 39-5-40(d). Therefore, defendant's Motion for a Directed Verdict as to plaintiff's Third Cause of Action is also granted on this additional ground.

The evidence presented as a part of Bostick's case leads to the inescapable conclusion that Michelin did not renew Bostick's Dealer Sales Agreement in 1978 because of Bostick's continuous and significant failure to develop the service capabilities it had agreed to in the Dealer Sales Agreement. Michelin said the reason for non-renewal was this persistent failure, and no evidence was introduced tending to show otherwise. Every Michelin dealer called by Bostick at trial provided service; there was no evidence that anyone other than Bostick failed to provide service.[9] Even George Edwards, plaintiff's expert,

[8]Because the Court has concluded that the South Carolina Act does not apply in this case, it need not, and does not, reach the constitutional issues raised by the defendant.

[9]The absence of such proof was acknowledged by plaintiff's counsel:

The Court: Did you introduce any evidence that any other dealer anywhere didn't give service?

Mr. Staton: No, your Honor.

The Court: There's no evidence in the record but that service was given by every Michelin dealer you put on the stand or took a deposition.

Mr. Staton: Right, sir.

stated that service was very important in the tire industry.[20] The evidence and testimony presented is susceptible of but one conclusion, that Michelin declined to continue dealing with Bostick for compelling and legitimate business reasons. In *World-Wide Volkswagen Corp. v. Autobahn Motors Co., supra*, a declaratory judgment was sought by World-Wide as the exclusive distributor of Volkswagen automobiles in New York, New Jersey and Connecticut to permit the non-renewal of Autobahn's dealer franchise. In addressing the validity of World-Wide's requirement for service training, the Court held:

> We find that World-Wide's requirement that its dealers' service employees be specially trained in their work was a reasonable requirement, that the policy was uniformly applied to all dealers and was not arbitrarily imposed upon Autobahn. Autobahn's failure to maintain an adequate trained force of service personnel constitutes a factor justifying termination of its franchise. *See Garvin v. American Motors Sales Corp., supra*, 520.

When, as here, the testimony and evidence presented by the plaintiff must lead to the conclusion that the business relationship between the parties was terminated for a legitimate business reason, this Court cannot allow the jury to engage in proposed, but totally unsupported, speculation as to possible improper reasons for non-renewal.

THE FRAUD CLAIM

Plaintiff's action for common law fraud relates solely to advertising in 1978. Bostick contends that in early 1978 Michelin representatives, who allegedly should have known that Bostick might not be renewed in 1978, came to Bostick and urged its participation in a bonus program which would call for Bostick to engage in extensive advertising and to order a greater number of

[20] See Page 81 of Edwards deposition, confirmed by him on cross-examination. At the trial Edwards admitted he was a researcher for Bridgstone, a competitive tire manufacturer.

tires than it had during the previous year. Before being able to fulfill the requirements of the program, the theory proceeds, Bostick's business relationship with Michelin was ended.

Either because of a concentration on the antitrust aspects of this case, or because there was no proof available on this issue, the common law fraud and deceit claim fails utterly. What little evidence the plaintiff was able to offer on this cause cannot withstand defendant's Motion for Directed Verdict.

Under the South Carolina law, an action for fraud is based on the presence of nine separate elements: a representation; its falsity; its materiality; the author's knowledge of its falsity or ignorance of its truth; the author's intent that it should be acted upon by the person and in the manner reasonably contemplated; the other party's ignorance of its falsity; his reliance on its truth; his right to rely thereon; and, his consequent and proximate injury thereby. *Miller v. Premier Corp.*, 608 F.2d 973 (4th Cir. 1977) (applying South Carolina law); *O'Shields v. Southern Fountain Mobile Homes, Inc.*, 262 S.C. 276, 204 S.E. 2d 50 (1974); *Lundy v. Palmetto State Life Insurance Co.*, 256 S.C. 506, 183 S.E. 2d 335 (1971); *Moye v. Wilson Motors, Inc.*, 254 S.C. 471, 176 S.E. 2d 147 (1970). Even a failure to plead each of the nine elements of fraud renders a complaint fatally defective. *Warr v. Carolina Power & Light Co.*, 237 S.C. 121, 115 S.E. 2d 799 (1960). Bostick's amended complaint fails to allege all nine elements of fraud as to a single course of conduct. The pleading has commingled various alleged courses of conduct with various fraud allegations.

Aside from a matter of pleading, as a matter of proof a party must establish each element of fraud by clear, cogent and convincing evidence, and a failure to prove any one of the nine elements is fatal to recovery. *O'Shields v. Southern Fountain Mobile Homes, Inc., supra.*

The record is silent on any representation made to Bostick which was contrary to the terms set forth in the applicable program documents. Furthermore, if the claim is that the fraud related to future events, even the proof of this would not be

legally sufficient since a misrepresentation generally must relate to an existing or pre-existing fact; fraud cannot be predicted on unfulfilled promises or statements as to future occurrences. *Miller v. Premier Corp., supra; Moye v. Wilson Motors, Inc., supra.* If it is claimed that the fraud was contained in the written program materials, then Bostick would be bound by the rule that one cannot complain of fraud in the misrepresentation of the contents of a written instrument when the truth could have been ascertained by reading the instrument. *Doub v. Weathersby-Breeland Inc. Agency,* 268 S.C. 319, 233 S.E. 2d 111 (1977).

Even if there were evidence tending to support Bostick's claim, which there is not, Bostick's voluntary return of tires to Michelin and resulting disqualification for even a one percent bonus renders the point moot. Radford testified that Michelin would not have let the second six-month advertising requirement interfere with Bostick's otherwise earned PIB bonus if Bostick had qualified for the one percent in all other respects. It was Bostick's own voluntary return of tires to reduce its indebtedness to Michelin which prevented Bostick from qualifying under the Program.

Again, the elements constituting fraud were not all pled, but even if they had been, not a single element was proven, and this claim fails as a matter of law. The defendant's Motion for a Directed Verdict must be granted.

CONCLUSION

Prior to the filing of this Order plaintiff and defendant consented to the dismissal with prejudice of the fifth cause of action and the counterclaim respectively. For the reason stated above, this Court has concluded that the defendant's Motion for Directed Verdict must be granted as to the first four causes of action. To put defendant to the expense of defending claims so sparsely supported by the evidence is not within the concept of justice.

AND IT IS SO ORDERED.

ROBERT W. HEMPHILL
Senior United States District Judge

August 3, 1981 *
Nunc Pro Tunc
Rock Hill, South Carolina

*Time for Appeal shall start running from September 14, 1981

APPENDIX D

STATEMENT OF CORPORATE AFFILIATION

Pursuant to Rule 28, Michelin Tire Corporation makes the following disclosure:

> Petitioner is an indirect subsidiary of Compagnie Generale des Establissements Michelin, A French entity in the nature of a commanditory partnership whose non-voting stock is listed on the Paris Bourse (stock exchange). This entity does not do business in the United States nor are its securities traded in the United States to the Appellee's knowledge.

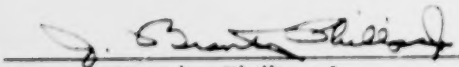
APPENDIX E

CERTIFICATE OF SERVICE

This is to certify that three copies of the Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit were served upon opposing counsel this 17th day of August, 1983, by depositing in the U.S. Mail, with proper postage affixed, addressed to:

Robert E. Staton, Esquire
Michael H. Quinn, Esquire
Quinn, Brown, Staton & Boyle
Post Office Box 73
Columbia, South Carolina 29202

All parties required to be served have been served.



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